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Nos. 141-154

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 141. HILARY HALBERT, JR., DOROTHY HALBERT RUBBLE, MILDRED HALBERT, A MINOR, ETC., ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 142. RICH. HALBERT, A MINOR, BY FRED. P. HALBERT, GUARDIAN AD LITEM, PETITIONER, *v.* THE UNITED STATES OF AMERICA

No. 143. VERNON SIDNEY HALBERT, A MINOR, BY BENJAMIN F. HALBERT, GUARDIAN AD LITEM, PETITIONER, *v.* THE UNITED STATES OF AMERICA

No. 144. SIDNEY E. HALBERT, A MINOR, BY SIDNEY SETH HALBERT, GUARDIAN AD LITEM, PETITIONER, *v.* THE UNITED STATES OF AMERICA

No. 145. ROSE PEERS PICKERNELL, MABEL PEERS WHITE, AND AMELIA PEERS ALDEN, PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 146. LULU M. ELLIOTT, SOPHIE M. ELLIOTT, CAROLYN M. ELLIOTT, ETC., ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 147. MARY BARICHIO PETIT AND NORRIS PETIT, ELLIS A. PETIT, ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 148. DEWITT BARICHIO AND LEDA E. BARICHIO, ROBIE D. BARICHIO, ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 149. EDNA MAY ELLIOTT, RUTH G. ELLIOTT, WILLIAM H. ELLIOTT, ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 150. CHAS. G. ELLIOTT, JR., ANNA MARIE ELLIOTT, HENRY ELLIOTT, ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 151. AGNES RUBENS, LOUISE HENRY PETERSON, MARY HENRY HAGEN, ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 152. VIRGINIA WALKOWSKY, ALVIN WALKOWSKY, CATHERINE WALKOWSKY, ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 153. LIZZIE ROLFSON, ALVIN SMITH, EUGENE SMITH, ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

No. 154. MARY FRANCIS PROVOE, LAURA M. BROWN, FRANK M. PROVOE, ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	4
Jurisdiction	4
Questions presented	4
Treaties, statutes, and Executive Order involved	5
Statement	5
Summary of argument	18
Argument:	
I. Are persons whose only Indian blood is Chehalis, Chinook, or Cowlitz entitled, under any circumstances, to allotments upon the Quinaielt Reservation?	21
II. None of the petitioners, except possibly those in Nos. 152 and 154, are of sufficient Chehalis, Cowlitz, and Chinook blood to entitle them to allotments even if members of these tribes are entitled to allotments	29
III. May a claimant obtain an allotment on the Quinaielt Reservation in spite of the fact that he did not at the time of his application reside upon the Quinaielt or other reservation?	38
IV. Children of a white man and a Chinook-Chehalis Indian woman, who has been adopted by the Quinaielt tribe and who has been granted an allotment on the Quinaielt Reservation, are not by reason thereof entitled to allotments on the reservation under the Act of June 7, 1897	49
V. The Act of June 7, 1897, does not apply to the grandchildren of a white man and an Indian woman	52
VI. Other contentions of the petitioners	55
Conclusion	58
Appendix:	
A. Treaties, statutes, and Executive Order involved	I
B. Statement of the events leading up to the Quinaielt Treaty of 1855–1856 and the establishment of the Quinaielt Reservation	XI

CITATIONS

Cases:

Farrell v. *United States*, 110 Fed. 942	31, 32, 34, 51
Frasee v. *Spokane County*, 69 Pac. 779	32
Hy-yu-tse-mil-kin v. *Smith*, 194 U. S. 401	34, 40

43861—31——1

Cases—Continued. Page
Keith v. *United States*, 8 Okla. 446 31
Lemieux v. *United States*, 15 F. (2d) 518, certiorari denied, 273 U. S. 749 40
Oakes v. *United States*, 172 Fed. 305 ..... 31, 52, 54
Pape v. *United States*, 19 F. (2d) 219 ..... 31, 51, 56
Reynolds, Ex parte, 5 Dill 394, Fed. Case 11719 31
Reynolds v. *United States*, 205 Fed. 685 54
Smith v. *Bonifer*, 154 Fed. 883; 166 Fed. 846 ..... 31, 32, 34, 41, 51
State v. *Lewis*, 88 Pac. 940 32
State v. *Nicolls*, 112 Pac. 269 31
United States v. *Hadley*, 99 Fed. 437 ..... 31, 32, 34, 56
United States v. *Halbert*, 38 F. (2d) 795 ..... 4, 15
United States v. *Higgins*, 110 Fed. 609 56
United States v. *Mitchell*, 22 F. (2d) 771 ..... 55, 56
United States, v. *Payne* 264 U. S. 446 ..... 10, 42
United States v. *Provoe*, 38 F. (2d) 799 ..... 4, 16
United States v. *Rolfson*, 38 F. (2d) 806 ..... 4, 17
United States v. *Walkowsky*, 38 F. (2d) 805 ..... 4, 16
United States v. *Ward*, 42 Fed. 320 31
United States v. *Work*, 6 F. (2d) 696 54
West v. *Hitchcock*, 205 U. S. 80 56
William Banks Case, 26 Land Dec. 71 54

Treaties:
Treaty with the Quinaielt and Quillehute Indians of 1855 and 1856, 12 Stat. 971:
Art. I I
Art. II I
Art. III II
Art. V II
Art. VI III
Treaty with the Omahas, 10 Stat. 1043, 1044–1045 III

Statutes:
Act of February 8, 1887, c. 119, 24 Stat. 388, as amended by Acts of February 28, 1891, c. 383, 26 Stat. 794, and June 25, 1910, c. 431, 36 Stat. 859 (U. S. C., Title 25, Sec. 331):
Sec. 1 ..... 39, VI
Sec. 4 VII
Sec. 6 VII
Act of August 15, 1894, c. 290, Sec. 1, 28 Stat. 305, as amended by Act of February 6, 1901, c. 217, Sec. 1, 31 Stat. 760 (U. S. C., Title 25, Sec. 345) VII
Act of June 7, 1897, c. 3, 30 Stat. 62, 90 (U. S. C., Title 25, Sec. 184) ..... 50, VIII
Act of March 4, 1911, c. 246, 36 Stat. 1345–1346 ..... 25, IX
Executive Order of November 4, 1873 (Kappler, Indian Laws & Treaties, Vol. I, 2d ed., pp. 922–924) ..... 9, 24, V

Miscellaneous: Page

Handbook of American Indians, Part I 31
House Report 2152, 61st Cong., 3d Sess 27
House Report 1029, 70th Cong., 1st Sess 57
Letter of Indian Office to Department of Interior dated January 4, 1913 28
Memorandum of Solicitor of Interior Department to Secretary of Interior dated September 12, 1916 ..... 43, XIII
Letter of Interior Department to Attorney General dated June 13, 1930 45
Swan, "The Northwest Coast" ..... 47, XII
Kappler, "Indian Affairs, Laws, and Treaties," Vol. II, pp. 665, 669, 674, 682 IX
Concluding paragraphs and signers of the abortive treaty proposed by Governor Stevens to the Indians at the Council at Cosmopolis, February 25, 1855 IX

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 141

HILARY HALBERT, JR., DOROTHY HALBERT RUBBLE, Mildred Halbert, a Minor, etc., et al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 142

RICH HALBERT, A MINOR, BY FRED P. HALBERT, Guardian ad litem, petitioner

v.

THE UNITED STATES OF AMERICA

No. 143

VERNON SIDNEY HALBERT, A MINOR, BY BENJAMIN F. Halbert, Guardian ad litem, petitioner

v.

THE UNITED STATES OF AMERICA

No. 144

SIDNEY E. HALBERT, A MINOR, BY SIDNEY SETH HALbert, Guardian ad litem, petitioner

v.

THE UNITED STATES OF AMERICA

No. 145

ROSE PEERS PICKERNOLL, MABEL PEERS WHITE, AND Amelia Peers Alden, petitioners

v.

THE UNITED STATES OF AMERICA

No. 146

LULU M. ELLIOTT, SOPHIE M. ELLIOTT, CAROLYN M. Elliott, Etc., et al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 147

MARY BARICHIO PETIT AND NORRIS PETIT, ELLIS A. Petit, et al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 148

DEWEY BARICHIO AND LEDA E. BARICHIO, ROMIE D. Barichio, et al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 149

EDNA MAY ELLIOTT, RUTH G. ELLIOTT, WILLIAM H. Elliott, et al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 150

CHAS. G. ELLIOTT, JR., ANNA MARIE ELLIOTT, HENRY ELLIOTT, et al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 151

AGNES RUBENS, LOUISE HENRY PETERSON, MARY HENRY HAGEN, et al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 152

VIRGINIA WALKOWSKY, ALVIN WALKOWSKY, Catherine Walkowsky, et al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 153

LIZZIE ROLFSON, ALVIN SMITH, EUGENE SMITH, ET al., petitioners

v.

THE UNITED STATES OF AMERICA

No. 154

MARY FRANCIS PROVOE, LAURA M. BROWN, FRANK M. Provoe, et al., petitioners

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THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the District Court for the Western District of Washington, covering all the above-entitled cases (R. 285–375), is not reported. The four opinions of the Circuit Court of Appeals for the Ninth Circuit, covering all the above cases (R. 633–670), are reported as follows: *United States* v. *Halbert*, 38 F. (2d) 795; *United States* v. *Provoe*, 38 F. (2d) 799; *United States* v. *Walkowsky*, 38 F. (2d) 805; *United States* v. *Rolfson*, 38 F. (2d) 806.

JURISDICTION

The decrees of the Circuit Court of Appeals were entered February 24, 1930. (R. 670–685.) A petition for rehearing was denied March 31, 1930. (R. 685.) Petition for writs of certiorari was filed May 22, 1930, and certiorari was granted October 13, 1930. (R. 689–692.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether members of the Chehalis, Chinook, and Cowlitz tribes of Indians are entitled to allotments upon the Quinaielt Reservation.

2. If so, whether the petitioners, or any of them, are Chehalis, Chinook, or Cowlitz Indians.

3. Whether residence upon the Quinaielt Reservation, or upon some other reservation, is a pre-

requisite to allotment upon the Quinaielt Reservation.

4. Whether the children of a white man and an Indian woman, the latter being a member of the Quinaielt tribe by adoption but not by blood, are entitled to allotments upon the Quinaielt Reservation.

5. Whether the Act of June 7, 1897, applies to the grandchildren of a white man and an Indian woman.

6. Whether "recognition" of an Indian, not of Quinaielt blood, by the Quinaielt Indians as a member of the tribe, entitles such Indian to allotment upon the Quinaielt Reservation.

TREATIES, STATUTES, AND EXECUTIVE ORDER INVOLVED

These are set forth in Appendix A (pp. I–X, *infra*).

STATEMENT

These cases were actions brought by persons of part, or mixed, Indian blood in the District Court for the Western District of Washington under the Act of August 15, 1894, as amended (pp. VII–VIII, *infra*), for the purpose of securing allotments upon the Quinaielt Reservation, located in Gray's Harbor County, in the State of Washington.

Originally there were sixteen cases, involving sixty-two plaintiffs. They were consolidated for trial (R. 376) and for appeal (R. 633). The District Court, in a memorandum decision covering all the cases, held that all the plaintiffs, except seven,

were entitled to allotments. (R. 338-375.) These seven plaintiffs did not appeal. The Government appealed all the cases, fifteen in number, in which allotments were granted. The Circuit Court of Appeals, in four opinions covering the fifteen cases (R. 633-670), affirmed the judgment of the District Court with respect to the appellee Lizzie Rolfson (R. 683), remanded the cause for further proceeding with respect to the appellees Archie Pellard (R. 674) and Mary Francis Provoe (R. 684), and reversed the decrees with respect to all the other appellees (R. 670-685).[1] All the appellees as to whom the decrees of the District Court were reversed filed petitions for certiorari. The Government filed no petition for certiorari.

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[1] The following table is presented as an aid in identification of the various cases:

Number in this court	Number in district court	Pleadings and decree of district court (record pages)	Opinion of district court (record pages)	Opinion and decree of C. C. A. 9th (record pages)
141	299E	1-14	336-340	633-645, 669
142	300E	20-31	336-340	633-645, 671
143	301E	35-49	336-340	633-645, 672
144	303E	50-67	336-340	633-645, 673
145	307E	93-106	337-339	633-645, 675
146	312E	139-149	340-345	633-645, 676
147	320E	150-233	345-349	633-645, 677
148	321E	250-251	345-349	633-645, 678
149	324E	257-261	340-345	633-645, 679
150	327E	262-269	340-345	633-645, 680
151	328E	267-270	340-345	633-645, 681
152	315E	109-121	336-339	646-649, 682
153	316E	122-132	351-354	650-653, 683
154	326E	133-139	354-375	655-669, 684

All the above cases were combined as Number 8822 in the Circuit Court of Appeals.

The complaint in *Hillary Halbert, Jr. et al.* v. *United States*, Case No. 141, alleges in substance (R. 2–7): That the plaintiffs are Indians and members of the Quinaielt Tribe, and at present reside in Grays Harbor County, State of Washington; that the father of the plaintiffs is an Indian duly enrolled upon the Quinaielt Reservation and that he has been granted an allotment thereon; that the plaintiffs are each entitled, under the applicable treaties and statutes, to an allotment of 80 acres upon the reservation; that the plaintiffs have always lived and associated with the Quinaielt Indians; that they have made selections of lands upon the reservation and have duly applied for allotments thereof; that the United States, its officers and agents, have refused to allot the selected lands to the plaintiffs and have excluded the plaintiffs therefrom. The answer of the United States denies that the plaintiffs are Quinaielt Indians; admits that they have been denied allotments on the reservation, but denies that they are entitled thereto. The answer admits most of the other allegations, and the jurisdiction of the trial court. (R. 8–10.)

The complaints (R. 20, 38, 56, 92, 109, 129, 150, 169, 190, 209, 227, 248, 266) and answers (R. 27, 44, 62, 98, 116, 136, 157, 176, 197, 214, 234, 254, 273) in the other cases are similar to those in Case No. 141, save for variations arising out of differences in tribal ancestry, associations, and places of residence. It is stipulated that all the petitioners have

made applications for allotments and that these have been objected to by the Interior Department. (R. 528.)

The petitioners contend in this Court that they are members of the Chehalis, Chinook, and Cowlitz tribes or bands of Indians. They predicate their rights to allotments primarily upon the Quinaielt Treaty of 1855–1856 (pp. I–III, *infra*), the Executive Order of November 4, 1873 (pp. V–VI, *infra*), establishing the Quinaielt Reservation, the General Allotment Act of February 8, 1887, as amended (pp. VI–VII, *infra*), and the Special Allotment Act of March 4, 1911 (p. IX, *infra*), dealing with allotments on the Quinaielt Reservation.

The Quinaielt Reservation, containing about 195,000 acres (R. 442–443)* is located on the Pacific Ocean, around the mouth of the Quinaielt River, roughly about half way between the Strait of San Juan De Fuca or the Makah Indian Reservation on the north and the Columbia River on the south. (See map, p. 10 of petitioners' brief.) It is a heavily timbered area, upon most of which it is impracticable to live until the timber has been cleared. (R. 383, 404, 470.) There are between 150 and 200 Indians now living upon the reservation, most of whom live at the fishing villages of Taholah and Queets. (R. 383, 466.) Apparently it is difficult

*The petitioners contend that the reservation consists of 224,000 acres. (Pet. Br. 30.) The present records of the Interior Department show the reservation as consisting of about 214,000 acres. These differences do not appear to be material.

to make a living upon the reservation except by fishing. (R. 426, 499–501, 550.)

The Quinaielt Reservation was established pursuant to a Treaty with the Quinaielt and Quillehute Indians, executed on July 1, 1855, and January 25, 1856 (pp. I–III, *infra*). The events that preceded this treaty and the history of the establishment of the Reservation are set forth in Appendix B of this brief (pp. XI–XV, *infra*). By the Treaty the Indians ceded to the United States the territory which they occupied, upon condition that an area sufficient for their wants be set aside by the President, to which place they agreed to remove. The Treaty provided that the President in his discretion might consolidate other tribes with the contracting tribes.

On November 4, 1873, the following Executive Order was issued (pp. V–VI, *infra*):

> In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 (Stats. at Large, vol. 12, p. 971), and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory * * * be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast, viz: * * *

On February 8, 1887, the so-called General Allotment Act (pp. VI–VII, *infra*) was enacted,

which provided that where any tribe or band of Indians has been or shall be "located upon any reservation" the President might survey such reservation and cause allotments thereof to be made "to each Indian located thereon." On March 4, 1911, a Special Allotment Act was enacted (p. IX, *infra*), which provided that the Secretary of the Interior should make allotments upon the Quinaielt Reservation "to all members of the Hoh, Quileute, Ozette, or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of" July 1, 1855, and January 25, 1856.

The allotment of the Quinaielt Reservation was not undertaken until 1905. Between that date and 1910 approximately 750 allotments were made. (R. 437.) In 1910 allotments upon this reservation were discontinued, apparently for the reason that the Interior Department did not consider that timber land was allottable (see *United States v. Payne*, 264 U. S. 446), until 1923, when the allotting of the reservation was resumed. (R. 428, 539.) There is sufficient allottable land upon the Quinaielt Reservation to permit about 2,200 allotments. (R. 443.) About 1,200 allotments have been made up to the present time. (R. 383.)

Only a very few allottees live upon their allotments, possibly six (R. 446), and of the 1,200 allottees only a comparatively few reside upon the reservation (R. 383, 384, 404, 412, 417, 420, 422, 426, 444, 485, 495, 542, 569, 572). Some of the allot-

tees seldom, if ever, visit the reservation (R. 417) and others visit the reservation only during the fishing season (R. 412, 572). Many of the Indians residing at Bay Center, Hoquiam, and Dahlia (see map, p. 10, petitioners brief) have allotments on the reservation. (R. 383, 403, 411, 507, 569.) Numerous Indians other than Quinaielt and Quillehute Indians have been granted allotments upon the reservation. (R. 386–387, 397, 420, 424–425, 443–444, 493, 498, 534, 538, 563.) These include Humptulip, Chinook, Bay Center Indians, Wynooche, and Chehalis Indians. (R. 386, 387, 411, 443–444, 498, 534, 538, 563.)

The record does not show upon what basis certain of these "outside" Indians were granted allotments upon the Quinaielt Reservation. In earlier years some allotments seem to have been made over the objection of the Indians upon the reservation. (R. 468, 469.) In later years the outside Indians appear to have been granted allotments only when duly adopted by the Quinaielt Tribe. (R. 439–440.) One Indian Agent testified that in 1906 he was sent to the Indians at Bay Center and Shoalwater Bay with trust patents for allotments on the reservation in an attempt to persuade those Indians to accept the patents, stating that he informed the Indians that it was not necessary for them to reside on the reservation. (R. 494, 495.) One Indian testified that he did not live upon the reservation when he was granted an allotment. (R. 425.)

None of the petitioners reside on the Quinaielt Reservation. Most of them live in the territory south and southeast of the reservation and north of the Columbia River, in what petitioners call "the original tribal habitat of their ancestors." Referring generally to the petitioners, the trial court found that "They still cling together at and about the old haunts of the former tribal organization * * *." (R. 330.) One group of the petitioners live at Hoquiam on Gray's Harbor, about thirty miles from the reservation. (R. 383, 394, 403, 408, 472; see map at p. 10 of petitioner's brief.) The petitioners concede that Hoquiam is a white community at the present time, but it was originally an Indian settlement (R. 385, 400) and a number of Indians now live and trade there (R. 389, 412, 413, 476). The Indian Agency for the various tribes in this general region is located at Hoquiam. (R. 383, 385.) Some of the petitioners live at Dahlia, an Indian fishing village a few miles from the mouth of the Columbia River. (R. 485, 491, 507, 508, 519, 520, 527, 574.) Others live at Aberdeen, located on Gray's Harbor about thirty miles from Tahola. (R. 513, 517.) Others live at Bay Center and South Bend on Shoalwater Bay, which are still Indian communities to a considerable extent. (R. 495, 542, 546, 571, 574.) Others live at Oakville on the Chehalis Reservation and at Elma on the Chehalis River. (R. 586, 596.) One petitioner lives at Moclips, at the edge of the Quinaielt Reservation (R. 597), and another lives on the

shore of Quinaielt Lake, which forms a part of the Reservation. (R. 398.) A few of the petitioners live at Astoria, Oregon, near the mouth of the Columbia River. (R. 485, 588.) One of the petitioners lives in Tacoma, Washington (R. 596), and two live in California (R. 363, 391).

The petitioners for the most part make a living by fishing (R. 389, 398, 403, 413, 426, 465, 476, 488, 508, 514, 521, 548, 563, 566), gathering oysters (R. 388, 417, 426, 495, 548), and selling furs (R. 388, 557). A few work for white people in the lumber camps. One of the petitioners is a boatman and runs an auto park on Quinaielt Lake. (R. 399.) The occupations of the two petitioners who live in California and the one that lives in Tacoma are not shown. (R. 391, 596.) Although the Government has encouraged the Indians to take up the ways of the white people, many of the petitioners and the Indians with whom they live follow the same mode of life followed by the other Indians in the Gray's Harbor country and by the Indians who reside on the Quinaielt Reservation. (R. 388, 392, 415–416, 503, 542.) Many of the petitioners are related to and visit and associate with Indians living on the Quinaielt Reservation. (R. 406, 409, 489, 507, 511, 514, 515–516, 517–518, 521, 560, 566–567, 575, 596, 598, 611–612.) Some of the Indians on the Quinaielt Reservation fish off the reservation, often going as far south as the Columbia River to fish. (R. 384, 414, 417, 426, 489, 495, 508, 515, 556, 572.)

The District Court held that members of the Chehalis, Cowlitz, Chinook, and the so-called Shoalwater Bay tribes or bands were "other Indians in that locality" and members of "other tribes of fish-eating Indians on the Pacific Coast" within the meaning of the Executive Order of November 4, 1873 (pp. V–VI, *infra*); also that they were members of "other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of" July 1, 1855, and January 23, 1856, within the meaning of the Act of March 4, 1911 (p. IX, *infra*), and that, therefore, they were entitled to allotments on the Quinaielt Reservation. (R. 327, 329, 331.) Accordingly the court decreed that allotments should be made to all of those plaintiffs whom it found to be members of such tribes or bands. (R. 338–375.)

The District Court found that the petitioners in Nos. 141, 142, 143, 144 (R. 338–339), 147, 148 (R. 345–349), 145 (R. 357–358), 152 (R. 358–361), and 154 (R. 376) were Indians of either Chehalis, Cowlitz, or Chinook blood and members of such tribes or bands; that therefore they were entitled to allotments as such. The two petitioners in Case 153, who live in California, were held entitled to allotments, not because they were Indians or had been recognized as Indians, but because they were held by the District Court to be within the saving provisions of the Act of June 7, 1897, p. VIII, *infra*. (R. 361–364.) The petitioners in Nos. 146, 149,

150, and 151 were held by the District Court to be entitled to allotments because most of them had been adopted by the Quinaielt Indians at a tribal council held in 1912 (R. 340–345); the court found that these petitioners were persons of part Indian blood, who had lived as Indians and associated with the Quinaielt Indians, but did not make any finding as to the blood of these Indians.

The Circuit Court of Appeals, dividing the plaintiffs into four groups, held:

First group (*United States* v. *Halbert*, 38 F. (2d) 795)—

1. That under the General Allotment Act of February 8, 1887, as amended (pp. VI–VII, *infra*), only an Indian residing upon the Quinaielt Reservation was entitled to an allotment upon that reservation.

2. That the Act of March 4, 1911, modified the general allotment law only so as to permit allotments on the Quinaielt Reservation to Indians residing upon *other* reservations set aside for the tribes therein referred to.

3. That if the Act of June 7, 1897 (pp. VIII–IX, *infra*) makes an exception to the general rule (i. e., so as to dispense with the requirement of residence upon a reservation) that exception is applicable only to the *children* of an Indian woman and a white man, and not to the *grandchildren* of such marriage. (R. 643.)

This opinion was held applicable to the forty petitioners involved in cases Nos. 141 to 151, inclusive (R. 644–645), none of whom resided upon the Qui-

naielt or other reservation and none of whom the court found to be within the saving provisions of the Act of June 7, 1897. The court did not indicate whether in its opinion any of these petitioners would be entitled to allotments if residence upon the Quinhielt or other reservation were not a condition precedent.

Second group (*United States* v. *Provoe*, 38 F. (2d) 799)—

That Indians of Chehalis-Cowlitz blood living on the Chehalis Reservation are not entitled to allotments on the Quinaielt Reservation, since the Cowlitz-Chehalis tribes are not "other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes" in the Quinaielt Treaty, within the meaning of the Act of March 4, 1911.

This opinion was applied to the petitioners in case No. 154 (R. 109, 653–669, 684), several of whom resided upon the Chehalis Reservation.* (See map, p. 10 of petitioner's brief.)

Third group (*United States* v. *Walkowsky*, 38 F. (2d) 805)—

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*The bill of complaint in this case, as in the others, alleged that the petitioners involved were "Quinaielt Indians" (R. 110), whereas the evidence showed them to be Cowlitz or Chehalis Indians. The court said that this variance would, ordinarily, excuse it from passing on the questions presented, for the reason that in a suit by an Indian for allotment it must appear that his claim has been denied by the Secretary of the Interior and that in the instant case it was shown only that the Secretary had denied a claim based on the ground that the petitioners were Quinaielt Indians. The court, however, held that since no objection was made in the trial court to the evidence presented, the variance should not be fatal. (R. 656–658.)

That the Act of June 7, 1897, granting to the "children" born of a marriage between a white man and an Indian woman the same rights to property of the tribe to which the mother belongs, "by blood," as any other member of the tribe, dispensed with the requirements of residence upon a reservation as a condition to allotment; but that this Act did not apply to the children of a Chinook-Chehalis Indian woman, married to a white man, who had been *adopted* by the Quinaielt tribe, so as to entitle the children to allotments on the Quinaielt Reservation.

This opinion was held applicable to the four petitioners in Case No. 152. (R. 169, 648–649, 682.)

Fourth group (*United States v. Rolfson*, 38 F. (2d) 806)—

That the Act of June 1, 1897 does not apply to the children of a part Indian woman (married to a white man) who herself acquired tribal rights in the Quinaielt Reservation by virtue of that Act and not "by blood," and that "recognition" by the Quinaielt Indians of the Indian blood of these children, no matter how made, was not the equivalent of an *adoption*, and did not give such children a right to allotments on the Reservation.

This opinion was held applicable to the two petitioners in case No. 153. (R. 169, 650–653, 683; see Point V, *infra*.)

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[1] One of the plaintiffs in this suit, Lizzie Rolfsen, the mother of the other plaintiffs, was held entitled to an allotment under the Act of June 7, 1897, and the decree of the court below as to this petitioner was therefore affirmed.

SUMMARY OF ARGUMENT

1. The claim of most of the petitioners for allotment on the Quinaielt reservation is predicated upon the assumption that they are Indians of the Chehalis, Chinook, or Cowlitz tribes. We submit to the Court the question whether, if the petitioners are of such blood, the applicable treaty, executive order, and statutes give them any right to allotments.

The Treaty of 1855–1856 specifically authorized the establishment of a reservation for the Quinaielt and Quillehute tribes and empowered the President to consolidate with them "other friendly tribes or bands." The Executive Order of November 4, 1873, established a reservation "for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast," but recited that the purpose was to "provide for other Indians in that locality"—i. e. the locality of the Quinaielt and Quillehute Indians. Although the District Court found that the Cowlitz, Chinook, and Chehalis were tribes of fish-eating Indians on the Pacific Coast, most of them had their habitat at a considerable distance from that of the Quinaielts, and apparently they were not friendly with the Quinaielts. Indeed, the Indian Office held in 1916 that the Chinooks were not fish-eating Indians. The Special Allotment Act of March 4, 1911, authorizing the Secretary of the Interior to make

allotments on the Quinaielt reservation "to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty," would hardly extend to the Chinook, Chehalis, and Cowlitz tribes, inasmuch as they expressly refused to execute the treaty. But in the administration of the reservation, some allotments thereon have been made to members of the Chinook, Chehalis, and Cowlitz tribes, both before and after the Act of March 4, 1911, and some support may be found in opinions and the practice of the Interior Department for the contention that the Executive Order of November 4, 1873, extends to the Chinooks, Chehalis, and Cowlitz Indians.

2. But, in any event, we contend that most of the petitioners do not have sufficient Chinook, Chehalis, or Cowlitz blood to entitle them to be considered as members of the Chinook, Chehalis, or Cowlitz tribes. Our position as to this matter does not challenge any statement of fact in the opinion of the District Court. The Circuit Court of Appeals did not pass upon this point.

3. The Circuit Court of Appeals held that none of the petitioners was entitled to an allotment because no one of them at the time of his application for allotment lived on the Quinaielt reservation or any other reservation which the court regarded as com-

ing within the language of the Act of March 4, 1911. This conclusion was predicated upon the language of the General Allotment Act of February 8, 1887, upon which the petitioners rely. This authorized allotments on reservations "to each Indian *located* thereon." It also held that the Act of March 4, 1911, dispensed with requirement of residence on the Quinaielt reservation only in the case of persons residing on some other reservation coming within the purview of that act.

The Government at no time contended that residence on a reservation was necessary, and the practice of the Interior Department in regard to this particular reservation has been to make allotments to nonresidents. Nevertheless, the Indian Office has made frequent rulings that seem to require residence. We consequently submit the question to this Court.

4. The children of a white man and an Indian woman who is a member of the Quinaielt tribe by adoption but not by blood are not entitled to allotments upon the Quinaielt reservation under the Act of June 7, 1897. That Act grants only to the children of a white man and an Indian woman rights in the property "of the tribe to which the mother belongs * * * by blood."

5. The Act of June 7, 1897, does not apply to the grandchildren of a white man and an Indian woman, even where the mother of the children is of part Indian blood and the father a white man.

ARGUMENT

I

ARE PERSONS WHOSE ONLY INDIAN BLOOD IS CHEHALIS, CHINOOK, OR COWLITZ ENTITLED, UNDER ANY CIRCUMSTANCES, TO ALLOTMENTS ON THE QUINAIELT RESERVATION?

The petitioners are, for the most part, persons whose only Indian blood is Chehalis, Chinook, or Cowlitz. (See pp. XI–XV, *infra*.) The District Court held that by virtue of such blood, they were entitled to allotments on the Quinaielt reservation. This holding was based upon the conclusion of the court that the tribes were "affiliated" tribes within the meaning of the 1911 Act and that they were "fish-eating Indians" on the Pacific Coast between the Columbia River and the Neah Bay reservation. Both of these conclusions are challenged by the Government here. The Circuit Court of Appeals did not expressly pass upon this point, as it reversed the cases of most of the petitioners on the ground that none of them actually resided on the Quinaielt reservation.

We submit the question to the Court. As an original proposition, a strong argument can be made, on the basis of the treaty, the executive order, and the statutes involved, that persons having blood only of these three tribes are not entitled to allotment; but the administrative practice appears to have been consciously, at times, to make allotments to members of these tribes.

We will discuss first the construction of the treaty, the executive order, and the statutes, without regard to the administrative practice.

The Quinaielt Treaty (pp. I–III, *infra*) provided that the Quinaielt and Quillehute Indians, the only contracting tribes, should cede to the United States the land occupied by them, but that there should be reserved "for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President." Article VI of the Treaty provided that the President might, in his discretion, consolidate with the contracting Indians "other friendly tribes or bands" and that he might survey the reserved land into lots "and assign the same to such individuals or families as are willing to * * * locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

Article 6 of the Treaty with the Omahas (pp. III–V, *infra*) provided that the President might in his discretion survey the reservation there involved into lots and assign them to such Indians "who will locate on the same as a permanent home." This article specified the amounts of land to be assigned to individuals or families and the terms under which the assignments should be made. Provision was made for forfeiture of such lots if the Indians failed to live thereon.

In accordance with the provisions of the Quinaielt Treaty, a reservation was selected by the Superintendent of Indian Affairs for Washington Territory adjacent to the mouth of the Quinaielt River. (R. 297.) This reservation being too small "to provide for the needs of the Indians", it was never formally established, and in 1872 the Superintendent recommended that the reservation be enlarged (stating the proposed limits thereof) and that there should be collected upon the reservation not only the Quillehute, Hoh and Quit tribes "but also all the other tribes and bands of fish-eating Indians on the Pacific coast, from the south side of Neah Bay reservation to the mouth of the Columbia River." The territory thus designated included that occupied by the Chehalis, Cowlitz, and Chinook tribes. In his report the Superintendent stated that all the tribes in this region "are emphatically fish-eaters, and draw their subsistence almost wholly from the water." (R. 297, 298.) In October, 1873, the Indian Office recommended the enlargement of the reservation as selected by the Superintendent so that the "Hohs, Quits and other fish-eating Indians residing upon the coast between the Quinaielt river and the Makah Indian Reservation may be induced to go upon the reservation." (R. 299.) It will be noted that the Indian Office materially limited the proposal of the Superintendent as to the Indians to be included. The territory thus designated clearly

excluded that occupied by the Chehalis, Cowlitz, and Chinook Indians. Thereafter the Executive Order of November 4, 1873, was issued, which provided (pp. V–VI, *infra*):

> In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 * * *, and *to provide for other Indians in that locality*, it is hereby ordered that the following tract of country in Washington Territory * * * be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and *other tribes of fish-eating Indians on the Pacific Coast*, * * *. (Italics ours.)

The District Court found that the Chehalis, Chinook, and Cowlitz Indians are fish-eating Indians (R. 328–329, 348, 357, 366–367), as are the Quinaielt and Quillehute Indians, but there is evidence that the Chehalis, Chinook, and Cowlitz tribes were not friendly with the Quinaielts and Quillehutes and had, during the treaty negotiations, refused to join with them for that reason. (R. 440; see p. XII, *infra*.)

As is shown by the map appearing in the jacket in the back cover of this brief, the habitat of the Chehalis Indians bounded, in part, that of the Quinaielts. That of the Chinooks and Cowlitz was also in the State of Washington but at some little distance from the Quinaielts. Indeed, a reference to the map indicates that the Quinaielt

Reservation was carved almost wholly from recognized Quinaielt territory alone. As an original proposition, it would seem arguable that, inasmuch as the Executive Order shows an intention to provide only "for other Indians in that locality" and that the Chehalis, Chinooks, and Cowlitz were not friendly with the Quinaielts and Quillehutes, it was not intended to give the Chehalis, Chinooks, and Cowlitz Indians rights in the Quinaielt Reservation, and that the reference to "other Indians in that locality" did not include them. The broad language in the Executive Order, "other tribes of fish-eating Indians on the Pacific Coast," might well be construed to include only such other tribes as were in the immediate locality under the principle of *ejusdem generis*, particularly since the Order itself uses the phrase, "other Indians in that locality."

If this construction is sound, it would not seem that the petitioners gained any new rights by the Act of March 4, 1911 (p. IX, *infra*), upon which they rely. That Act directed the Secretary of the Interior to make allotments on the Quiniaelt Reservation to—

> all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third, eighteen hundred and fifty-six

and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes. [Subject to a proviso which need not here be considered.]

The District Court held that the word "treaty" in this Act was used in the broad sense of including not only the specific agreement of the parties, but also the negotiations leading up thereto; that since the Chehalis, Cowlitz, and Chinook Indians were present at the Cosmopolis meeting, which preceded the Quinaielt Treaty (pp. XI–XII, *infra*), such tribes were properly included in the words "other tribes * * * affiliated with the Quinaielt and Quileute tribes in the treaty"; that therefore recognized members of the Chehalis, Cowlitz, and Chinook tribes were entitled to allotments upon the Quinaielt Reservation, even though not resident thereon or on any other reservation. The Circuit Court of Appeals held that the words just quoted were qualified by the subsequent words "who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes"; that the only "other tribes" which were thus contemplated were those which had had reservations set aside for them when the 1911 Act was passed; and that the 1911 Act changed the 1887 Act merely by substituting the requirement of residence on one of these other reservations, at the election of the Indian, for residence upon the Quinaielt Reservation. (R. 640–641.)

Since the Cowlitz, Chinooks, and Chehalis Indians had refused to join in the Treaty at all (p. XII, *infra*), we have difficulty in concluding that they "affiliated in the Treaty" within the intent of the Act of March 4, 1911.

The conclusion that the 1911 Act referred only to Indians residing on certain specified reservations finds support in the report of the House Committee on Indian Affairs reporting the bill which became the 1911 Act. (H. Rep. 2152, 61st Cong., 3d Sess.) This report was based upon a letter from the Secretary of the Interior to the Chairman of the Senate Committee on Indian Affairs, in which letter the Secretary expressed the view that the purpose of the Act was to enable "members of the Hoh, Ozette, and Quile ute tribes, who are residing on a separate reservation set aside for them" to receive allotments on the Quinaielt Reservation.

An examination of the history of the administration of this reservation by the Indian Office as disclosed in the Opinion of the Solicitor of the Interior Department of September 12, 1916 (R. 296-326) shows that the practice has been in nowise uniform, as illustrated by the decision of the Indian Office (R. 302) that the Chinooks were not fish-eating Indians entitled to allotments, and also by the letter of the Indian Office of March 26, 1912 (R. 310-311), stating that the enlarged reservation was to provide for fish-eating Indians between the

Quinaielt River and the Makah Reservation—which territory was not occupied by the Chehalis, Cowlitz, or Chinooks. It is certain that numerous Indians other than members of the Quinaielt and Quillehute tribes have been granted allotments on the Quinaielt Reservation. These include Indians of Chehalis, Chinook, and Cowlitz blood (p. 11, *supra*). In a long opinion rendered in September, 1916, the Solicitor of the Department of the Interior, after reviewing many previous opinions and the practice over a long period of years, seems, in spite of some inconsistent statements, to have concluded that the Chinooks and Cowlitz, at least, were entitled to allotments (R. 324–325), and, if they were, obviously the Chehalis were. A large part of this opinion is printed in the Record (pp. 296–326).

It is also significant that in 1912 a bill was introduced in Congress to amend the 1911 Act and to provide for allotment on the Quinaielt Reservation "to the unallotted Indians of the Clallam, Cowlitz, Squaxon Island, Port Gamble, Hoh, Ozette, Quileute, and other fish-eating Indians of the State of Washington." (R. 315.) This bill was never reported upon by the Interior Department and did not become law. The Indian Office in a letter to the Department of the Interior dated Jan. 4, 1913, stated with respect to this bill (R. 320):

> House bill 22868, introduced April 4, 1912, but which has not yet been referred to the Department for report so far as this Office

has been advised, is designed to authorize allotments on the Quinaielt Reservation to the unallotted Indians of the Clallam, Cowlitz, Squaxon Island, Port Gamble, Hoh, Ozette, Quileute, and other fish-eating Indians in the State of Washington. In view of the treaties, executive orders, and acts hereinbefore set forth, it is believed that the Indians referred to in the pending bill may be allotted on the Quinaielt Reservation and that further legislation is unnecessary.

II

NONE OF THE PETITIONERS, EXCEPT POSSIBLY THOSE IN NOS. 152 AND 154, ARE OF SUFFICIENT CHEHALIS, COWLITZ AND CHINOOK BLOOD TO ENTITLE THEM TO ALLOTMENTS EVEN IF MEMBERS OF THESE TRIBES ARE ENTITLED TO ALLOTMENTS

In all of the bills of complaint the plaintiffs allege that they are members of the Quinaielt Tribe of Indians. (See for example R. 2, 21, 38.) This allegation is denied in the answer to each of the bills (see R. 9, 27, 45, etc.), and no one of the petitioners has shown that he is a member of the Quinaielt tribe. The petitioners for the most part now rely upon the fact that they are, to some degree, of Chehalis, Chinook, or Cowlitz blood. The District Court, after stating their ancestry, found that most of the petitioners were Chehalis, Chinook, or Cowlitz Indians. (See pp. 14–15, *supra*.) Apparently, no objection was made to evidence in regard to this blood. Although the opinion of the

District Court evidently predicated relief upon this conclusion, its decrees contained no mention of this assumption. No assignment of error specifically challenges the conclusion of the District Court that the petitioners are Chehalis, Chinook, or Cowlitz Indians, but there are broad, general assignments of error to the effect that the District Court erred in finding that the petitioners were entitled to have the land allotted to them and the like. (See, for example, R. 15–18.) In view of the fact that the opinion of the District Court sets out the lineage of each person, and that we do not challenge the accuracy of the District Court in regard to the facts of lineage, it seems admissible on the state of the record to contend that the facts as found by the District Court were not sufficient to warrant it in treating the petitioners as members of these tribes. The following is an analysis of the testimony applicable to each of the cases. Except for the petitioners in Nos. 146, 149, 150, and 151 (see Point VI, *infra*), it is not contended that any of these petitioners have been adopted by the Quinaielt Indians.

Case No. 141. The legal status of the petitioners in this case is that of white persons. They are the great grandchildren of a white man and an Upper Chehalis Indian woman, whose daughter, the grandmother of the petitioners, married a white man by the name of Halbert. The father of the petitioners is a son of this union. (R. 338–339, 418, 425, 427.) The general rule is that the children of a white man

and an Indian woman follow the condition of their father. *Pape* v. *United States*, 19 F. (2d) 219 (C. C. A. 9th); *Smith* v. *Bonifer*, 154 Fed. 883, affirmed 166 Fed. 846 (C. C. A. 8th); *Farrell* v. *United States*, 110 Fed. 942 (C. C. A. 8th); *United States* v. *Hadley*, 99 Fed. 437 (C. C. D. Wash.); *United States* v. *Ward*, 42 Fed. 820 (C. C. S. D. Cal.); *State* v. *Nicolls*, 112 Pac. 269; *Keith* v. *United States*, 8 Okla. 446; *Ex parte Reynolds*, 5 Dill 394, Fed. Case, 11,719. See *Oakes* v. *United States*, 172 Fed. 305 (C. C. A. 8th). The Quinaielt Indians, like the Chehalis and the Cowlitz, belong to the Salish family (Handbook of American Indians, Part 1, p. 418). The District Court held that members of the Salish family trace their lineage through the male ancestors and not through the female. (R. 374–375.)

As petitioners' grandmother was the daughter of a white man and an Indian woman, her legal status was that of a white person. As she herself married a white man her children, petitioners' father, the offspring of this union, must be regarded as white. Petitioners' mother is white (R. 338–339), and petitioners themselves can be regarded as nothing else but whites, notwithstanding their one-eighth degree of Indian blood.

Petitioners seem to rely upon the admission by the Government that they are Indians. But this admission, we submit, does not include also an admission that in the event that the evidence should establish that they are of Chehalis Indian

blood, their status should be regarded as that of Chehalis Indians, meaning by that term, members of the Chehalis Tribe of Indians, if there be such a tribe.

The term "Indian" in its general and natural sense means only a person of the Indian race, whether a member of a tribe or not. The idea of membership in a tribe is not necessarily included in the term "Indian." A person may be an "Indian" and yet not a "tribal Indian"; that is, an Indian who is a member of a tribe. *Frazee* v. *Spokane County*, 69 Pac. (Wash.) 779; *State* v. *Lewis*, 88 Pac. (Wash.) 940.

The contention that petitioners are Chehalis Indians completely overlooks the fact that their status is that of white persons and not that of tribal Indians. The fact that petitioners in these cases may possess a greater or less degree of Chehalis Indian blood is not sufficient to invest them with the status of members of any tribe of Indians. The rule, or rather an exception to the general rule concerning mixed-blood Indians, is that the child of a white man and an Indian woman, who is abandoned by his father, and who is nurtured and reared by the Indian mother in the tribal relation, and recognized by the tribe as a member of it, becomes a member of the tribe of the mother. *Farrell* v. *United States, supra.* See also *Smith* v. *Bonifer, supra*; and *United States* v. *Hadley, supra.*

Case No. 142. These petitioners are the great grandchildren of a white man and an Upper Chehalis Indian woman, whose daughter, the grandmother of the petitioners, married a white man by the name of Halbert. The father of petitioners is a son of this union. Petitioners' mother is white. (R. 338–339, 418, 425, 427.)

Case No. 143. These petitioners are the great grandchildren of a white man and an Upper Chehalis Indian woman, whose daughter, the grandmother of the petitioners, married a white man by the name of Halbert. The father of petitioners is a son of this union. Petitioners' mother is white. (R. 338–339, 418, 425, 427.)

Case No. 144. The petitioners are the great grandchildren of a white man and an Upper Chehalis Indian woman, whose daughter, the grandmother of the petitioners, married a white man by the name of Halbert. The father of petitioners is a son of this union. Petitioners' mother is white. (R. 338–339, 418, 425, 427.)

Case No. 146. The paternal grandmother of these petitioners, Agnes Ducheney, was a daughter of Mary E. Rondeau of Chinook lineage and a man by the name of Roque Ducheney, half French and half Indian. (R. 511–512.) Agnes Ducheney married a white man by the name of Elliott. (R. 511.) The father of the petitioners herein is a son of this union. (R. 511, 512, 518.) The blood relation of petitioners' mother does not appear.

The District Court found that these petitioners were "adopted" into the Quinaielt tribe at a tribal council of the Quinaielt Indians convened on April 4, 5, and 6, 1912. (R. 342–345.) There is no pretense, however, that such "adoption" was ever approved by the Secretary of the Interior in conformity with departmental regulations concerning the subject. (See Point VI, *infra*.)

Petitioners contend, however, that while their "adoption" by the Quinaielt Tribe may not be valid by reason of the fact that it was not approved by the Secretary of the Interior, such "adoption" should nevertheless be regarded as a "recognition" of their membership in the tribe.

The term "recognition of membership in the tribe" presupposes, we submit, a pre-existing membership in the tribe by reason of the circumstances of birth and tribal affiliations of the person so recognized; otherwise there can be no recognition, but merely an attempted adoption. Such was the case, for instance, in *Hy-yu-tse-mil-kin* v. *Smith*, 194 U. S. 401; *Smith* v. *Bonifer*, *supra*; *Farrell* v. *United States*, *supra*; *United States* v. *Hadley*, *supra*.

Case No. 149. The paternal grandmother of these petitioners, Agnes Ducheney, was a daughter of Mary E. Rondeau, of Chinook lineage, and a man by the name of Roque Ducheney, half French and half Indian. (R. 511–512.) Agnes Ducheney married a white man by the name of Elliott. (R. 511.) The father of the petitioners herein is a

son of this union. (R. 511, 512, 518.) The blood relation of petitioners' mother does not appear.

Case No. 150. The father of the petitioners herein is a brother of the father of the petitioners in case 149. The mother of petitioners is a white woman. (R. 510, 511, 512, 518.)

Case No. 151. The mother of the petitioners herein is a sister of the fathers of the petitioners in Cases 149 and 150. (R. 511, 512–518.) She married a white man. (R. 490–491.) The status of petitioners, following that of their father, is that of white persons.

Case No. 147. The great grandmother of the petitioners in this case was a full-blooded so-called Shoalwater Bay Indian. Her ancestry may have been a mixture of Chehalis, Chinook, and Quinaielt. (R. 349, 550, 551, 555.) She married a white man—an Italian by the name of Barichio. (R. 551.) Frank Barichio, the grandfather of petitioners, was a son of this union. (R. 551.) His status, following that of his father, was that of a white person. He married one Lena Givens, reputed to have some Indian blood, but she was mostly white. (R. 551.) Mary Barichio, petitioner, was a daughter of this union (R. 551, 569), and her status, following that of her father, was that of a white person. She married Paul Petit, an Indian whose blood relation does not appear. (R. 552, 553, 569, 570.) The record does not show that Paul Petit is a member of any tribe. He was born at Bay Center and has lived there practically

all of his life. His name indicates that some of his male ancestry is white.

As to the other petitioner, Oscar Brignone, the record shows that his father was a man named Brignone who lived on the Columbia River and whose blood relation does not appear. (R. 552, 553, 570.) His name, Brignone, indicates that either his father or some of his more remote male ancestry was French. His mother was a full sister of Frank Barichio (R. 550), and her status, like his, was that of a white person.

Case No. 148. Dewey Barichio, one of the petitioners herein, was a son of Frank Barichio and Lena Givens, referred to in case No. 147. His status, following that of his father, Frank Barichio, is that of a white person. He married an Indian woman whose blood relation does not appear. (R. 551, 569, 570.) Leda E., Romney D., and Andrew B. Barichio, the other petitioners herein, being children of this union (R. 551, 569, 570), and following the status of their father, must be also regarded as white persons.

Case No. 145. The petitioners in this case are children of Henry Peers and Julia or Judith Ducheney, both deceased. (R. 93, 98, 99, 575.) The record indicates that Henry Peers' mother was a Lower Chehalis or Chinook Indian. (R. 519, 561.) The record also indicates that Henry Peers came from Canada or British Columbia. (R. 576.) Who his father was does not appear. Julia or Judith Ducheney was a full sister of Agnes

Ducheney Elliott, whose father was half French and half Indian. (R. 511, 512, 519, 520.) There is nothing in the record to show that either Henry Peers or Judith Ducheney was ever recognized as a member of the Quinaielt tribe by blood or that the petitioners have ever been adopted into the Quinaielt tribe.

Case No. 152. Kate Walkowsky, mother of the petitioners in this case, was born in 1874 at Oysterville, on Shoalwater Bay. (R. 359, 521, 646.) Her mother was an Indian of the Wynooche band of the Lower Chehalis Indians and her father was full-blooded Chinook Indian. (R. 360, 522, 646.) For reasons already stated Kate Walkowsky Weiss took the status of her father, a Chinook Indian, and not that of her mother. (R. 646–647.) Kate Walkowsky married John Walkowsky, a white man (R. 359, 521, 646), and the status of her children born of this union is that of white persons. Nevertheless, if Chinooks are entitled to allotments the petitioners in this case would seem to be entitled to them under the provisions of the Act of June 7, 1897. (But see Point IV, *infra*.)

Case No. 153. Lizzie Rolfson, mother of the two petitioners in this case, was the daughter of a white man and a Chehalis Indian mother. (R. 362.) She was born on her father's homestead. Her status, following that of her father, was that of a white man. (R. 472.) Petitioners Alvin and Eugene Smith are children of Lizzie Rolfson and a white man (R. 362, 474), and their status, fol-

lowing that of their father, is therefore that of white persons.

Case No. 154. Mary Francis Provoe, petitioner, and the mother of the other petitioners in this case, was the daughter of a white man and a Chehalis Indian woman. She married David Provoe, a Cowlitz Indian by adoption, and both of the courts below found that her status, as well as that of her children, following that of the husband and father, is that of Cowlitz Indians. (R. 375, 668.)

III

MAY A CLAIMANT OBTAIN AN ALLOTMENT ON THE QUINAIELT RESERVATION IN SPITE OF THE FACT THAT HE DID NOT AT THE TIME OF HIS APPLICATION RESIDE UPON THE QUINAIELT OR OTHER RESERVATION?

Although the Government at no time contended that such residence was a prerequisite to an allotment, the Circuit Court of Appeals refused relief to most of the petitioners on the ground that it was a prerequisite. In view of this holding, we submit this question to the Court for decision.

The argument in support of this conclusion of the Circuit Court of Appeals is made in its opinion. (R. 633–645, 653–670.) Although it did not discuss the matter, the District Court clearly did not regard residence on a reservation as necessary. Except for the petitioners in case No. 154, some of whom reside upon the Chehalis Reservation, none of the petitioners reside upon the Quinaielt or other reservation. The Circuit Court of Appeals held

that residence upon the Chehalis Reservation was not sufficient.

The first statutory provision upon which the petitioners base their claims for allotments is the General Allotment Act of 1887 (pp. VI–VII, *infra*). Section 1 of that Act provides:

> That in all cases where any tribe or band of Indians has been or shall hereafter *be located upon any reservation* created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to *each Indian located thereon* to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. (Italics ours.)

Support for the conclusion of the Circuit Court of Appeals is found in Section 4 of the General Allotment Act of 1887, which provides that "where any Indian *not residing upon a reservation*, or for whose tribe no reservation has been provided," shall make a settlement upon any lands of the United States not otherwise appropriated, such Indian shall be entitled to an allotment upon such lands in the same manner as provided for "Indians residing

upon reservations." The two sections together afford the basis for contending that Section 1 was intended to provide for Indians who resided upon reservations and that Section 4 was intended to provide for Indians who do not reside upon reservations.[5] Moreover, the conclusion of the Circuit Court of Appeals finds some support in the statement of the court in *Lemieux* v. *United States*, 15 F. (2d) 518, 521 (C. C. A. 8th), certiorari denied, 273 U. S. 749, that:

> No case has been cited, and we have been unable to find any, which holds that a tribal Indian, living apart from the Tribe and off the reservation, is entitled to an allotment under section 1 of the act of 1887, and the language of that act seems to preclude such a holding.

Petitioners rely upon the case of *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U. S. 401, *supra*. In that case, which involved the allotment Act of March 3, 1885, c. 319, 23 Stat. 340, relating to the bands of Cayuse, Walla Walla and Umatilla Indians "residing upon the Umatilla reservation," it was held that it was not necessary, for an allotment, that individual members of the tribes mentioned should be actually residing upon the reser-

[5] It is clear that the word "located" in this Act has no reference to any particular time and that "being on the reservation at the instant of time the act was passed" is not a necessary condition. *Fairbanks* v. *United States*, 223 U. S. 215, 225.

vation at the time of the passage of the Act, and that the language quoted related to the residence of the Indians upon the reservation as "bands" and not as "individual Indians." That treaty, like the Quinaielt Treaty, contained a provision requiring the Indians to remove to the reservation within one year, but the Court found that many Indians had not removed to the reservation when the allotment Act in question was passed. The Court stated (p. 412) that the purpose of the treaty and the Act was to induce the Indians to break up the tribal relations and adopt the habits of an agricultural people, and that this purpose would fall short of accomplishment if the allotments were "confined exclusively to those actually residing within the limits of the reservation, while those who were absent therefrom, but still within the old limits of the land, and were members of the band, recognized as such, should be held not entitled * * * simply because of residence outside of * * * the reservation." That case, however, did not involve the General Allotment Act.

In *Bonifer* v. *Smith*, 166 Fed. 846 (C. C. A. 9th), which also involved the Act of March 3, 1885, the court, on authority of the *Hy-Yu-Tse-Mil-Kin case*, held that a member of the Walla Walla Tribe was entitled to an allotment upon the Umatilla Reservation, even though she did not reside thereon or even within the territory originally ceded by those Indians to the United States.

The petitioners contend that it is unreasonable to require residence upon the Quinaielt Reservation as a condition to allotment thereon because the physical character of the land is such as to preclude residence there until the timber has been removed. That much of the reservation is covered with timber is clear. But that not all the reservation is uninhabitable is apparent because of the fact that more than 150 Indians dwell thereon, and many Indians, including some of the petitioners, visit the reservation and fish there. (Pp. 9–14, *supra*.) If the applicable statutes require residence thereon as a condition to allotment, it does not seem that the mere fact that much of the reservation is difficult of residence, until the timber is cleared, would dispense with the statutory requirement. The presence of the timber would simply require the prospective allottee to clear the timber. See *United States* v. *Payne*, 264 U. S. 446, 449. If the statute requires residence, and residence because of the physical conditions is difficult, the remedy, if any is needed, is a matter for legislative, not judicial, cognizance.

The petitioners apparently contend further that they have never had an opportunity to reside on the reservation and in fact that access to the reservation has been denied them. (Pet. Br. 40–41.) This contention is based upon the allegations in the complaints that the United States, its officers and agents, "have denied and excluded, and still deny and exclude plaintiffs herein from said land,

and have refused and still refuse to let said plaintiffs go upon or reside upon said lands." (R. 6, etc.) The answer filed by the United States to these allegations admitted that the United States "has refused to allot certain lands to the plaintiffs herein, but denies that said refusal was wrong." (R. 10, etc.) The allegations of the complaints obviously relate to exclusion, not from the reservation, but merely from the lands selected by the petitioners for allotment. (See paragraph X, R. 6.) Not only is there no evidence in the record that petitioners were denied such access, but there is evidence that some of them visited the reservation frequently and associated with the Indians thereon. (P. 13, *supra.*)

Some light is thrown upon the question of residence as a necessary condition to allotment by the views of the executive department charged with the administration of the allotment laws.

On September 12, 1916, the Solicitor for the Interior Department, in the memorandum for the Secretary of the Interior above referred to, made a detailed review of the statutes, treaties and executive orders having a bearing upon the question of allotments upon the Quinaielt Reservation, and prior opinions of the Department with respect thereto, and concluded (R. 324):

> * * * that only those Indians whose tribes or bands were parties to the treaty of 1855 and 1856, or are members of the tribes

or bands named in Executive Order of November 4, 1873, and the Act of March 4, 1911, or are found to be in affiliation with the Indians of Quinaielt reservation, and who have not received allotments on the reservations of their respective tribes or bands; and, furthermore, *who remove to and take up their residence on said reservation as indicated by Article 6 of the treaty of 1855–1856,* are entitled to enrollment and allotment on that reservation. (Italics ours.)

While the Solicitor in this opinion was not primarily concerned with the specific point now under discussion, it is of some significance that one of the requirements for allotment stated was that the Indians "remove to and take up their residence on said reservation as indicated by Article 6 of the treaty of 1855–1856." And the Indian Office has made frequent rulings that seemed to fix residence requirements. (R. 297, 303, 308, 311–312, 317, 318, 322, 323, 324.)

As to the actual practice in the past with respect to granting allotments, the record is not clear. It is certain that numerous Indians other than the members of the Quinaielt and Quileute tribes have been granted allotments thereon. These include Indians of Chinook, Chehalis and Cowlitz blood. Only a negligible number of allottees live on their allotments and only a relatively small number of the 1,200 allottees live on the reservation. (P. 11,

supra.) There is evidence in the record that in the past allotments have been granted to some Indians who were not residing upon the reservation at the time. (R. 494–495, 425. See pp. 11–12, *supra.*) But although the record does not show with any certainty whether in the past residence upon the Quinaielt reservation, or on some other reservation, has been required as a condition precedent to the granting of an allotment, the Attorney General was advised by the Interior Department by letter dated June 13, 1930, as follows:

> In your letter you asked for information as to what has been the custom of the Department with reference to residence upon the reservation as an indispensable prerequisite to allotment thereon. The matter of residence upon the reservation was not insisted upon as a prerequisite to allotment, either before or after the passage of the Act of March 4, 1911 (36 Stat. L., 1345) so far as the Quinaielt and other Indians mentioned in the Act or those who were affiliated with the Quinaielt in the Treaty of 1855 and 1856 are concerned. A number of allotments have been made to those who have resided away from the reservation.

The Department of the Interior and the Department of Justice in 1929 discontinued the defense to a bill in equity seeking an allotment on the reservation in question, although it appeared that the

plaintiff, a Quinaielt Indian, had never resided upon the reservation. (For copies of the correspondence, see petitioner's brief, pp. 176–180.)

Case No. 154, *Mary Francis Provoe et al. v. United States*, involves a Chehalis woman, who had married a person who was a Cowlitz (by adoption), and her seven children, all of whom are seeking allotments on the Quinaielt Reservation. Five of these eight petitioners reside on the Chehalis Reservation;* this is the only one of the cases before this Court which involves any petitioners who actually reside upon a reservation.

Assuming that residence upon the Quinaielt Reservation, *or upon the reservation of some other tribe contemplated by the Act of March 4, 1911*, is a requisite to allotment upon the Quinaielt Reservation (as held by the Circuit Court of Appeals), Case No. 154 presents the question whether residence upon the Chehalis Reservation is sufficient.

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* Mary Francis Provoe, the mother of the other eight petitioners in case No. 154, and her children, William Provoe, Frank Provoe, Raymond Provoe, and Rose Garrard, live at Oakville on the Chehalis Reservation. (R. 586, 590, 599.) John Provoe, one of the original plaintiffs in this suit, is now dead. (R. 586.) The other three petitioners in this case do not live on the Chehalis Reservation. Sarah Spencer used to live at Oakville but for the last few years has lived at Moclips, just on the edge of the Quinaielt Reservation. (R. 596–597.) Laura Brown lives at Black Lake. (R. 596), which is not far from Tumwater (R. 367; see map at p. 10, petitioners' brief), Isabelle R. Ramey lives at Tacoma, Washington. (R. 596.)

The Circuit Court of Appeals held that residence upon the Chehalis Reservation did not meet the statutory requirements because, in its opinion, the Cowlitz and Chehalis Indians were not "other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes" in the Treaty of 1855–56, within the meaning of the Act of March 4, 1911. (R. 653–669.) The court did not express an opinion whether these petitioners would be entitled to allotments if the court was wrong in its construction of the statute.

The treaty proposed by Governor Stevens to the tribes assembled at the Cosmopolis meeting provided for the cession to the United States, roughly, of the territory on the Pacific Coast between the Makah Reservation on the north and the Columbia River on the south.[1] This territory unquestionably included the land then occupied by the Chehalis, Cowlitz and Chinook tribes. (Pp. XII, XIV–XV, *infra*.) For reasons set forth in Appendix B, pp. XI–XV, *infra*, these tribes refused to sign the proposed treaty. The Quinaielt Treaty, signed in 1855–56, executed only by the Quinaielt and Quillehute tribes, provided for cession to the United States of the lands on the Pacific Coast south of the Makah Reservation *only to the dividing ridge between the Chehalis and Quinaielt (Quiniatl) Rivers.*

[1] See map in pocket at the end of this brief; see map at p. 10 of petitioners' brief. See Art. I of abortive treaty proposed by Gov. Stevens at Cosmopolis. See also Swan, "The Northwest Coast," pp. 343–344.

(P. I, *infra*.) This land included only a small part of the Chehalis-Cowlitz territory and apparently none of the Chinook territory.*

The decision of the Circuit Court of Appeals that the Chehalis, Cowlitz and Chinook Indians were not "other tribes * * * affiliated with the Quinaielt and Quileute tribes" in the Quinaielt Treaty was based chiefly upon the fact that the tribes mentioned refused to sign the treaty originally proposed, and that in the treaty as finally executed most of the lands occupied by the Chehalis, Cowlitz and Chinook Indians at the time of the treaty were not included in the lands ceded to the United States. The District Court took the position that the word "treaty" in the Act of 1911 included not only the technical agreement between the parties but the negotiations leading up thereto, and that as the Cowlitz, Chehalis and Chinook tribes were represented in these prior negotiations (p. XI, *infra*), they were, therefore, affiliated with the Quinaielt Indians "in the treaty", within the meaning the statute.

The Circuit Court of Appeals also took the view that, under the rule of *ejusdem generis*, the words "other tribes * * * affiliated * * * in the treaty" referred only to tribes affiliated with the Quinaielt and Quileute tribes as the "Hoh, Quileute, Ozette" tribes were affiliated therewith. It then

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*Only two of the petitioners in all the cases before the court reside within the area ceded by the treaty. (Pet. Br. 38–39.)

found that the Hohs were really a band of the Quileute Indians, and the Quits were really a subdivision of the Quinaielt tribe, whereas the Chehalis, Cowlitz, and Chinook Indians were wholly independent tribes. The Ozettes, also expressly named in the 1911 Act, were not related to the Quinaielt or Quileute Indians, so far as the record discloses, any more closely, save by proximity of residence, than the Chehalis, Cowlitz, or Chinook Indians. The court gave meaning to the words "other tribes * * * affiliated * * * in the treaty" by finding them applicable to the Quit Indians. But the court had already found that the Quits, for whom no separate reservation has been set apart, were a subdivision of the Quinaielts, and, therefore, would appear to be entitled to allotments on the reservation wholly apart from the 1911 Act.

IV

CHILDREN OF A WHITE MAN AND A CHINOOK-CHEHALIS INDIAN WOMAN, WHO HAS BEEN ADOPTED BY THE QUINAIELT TRIBE AND WHO HAS BEEN GRANTED AN ALLOTMENT ON THE QUINAIELT RESERVATION, ARE NOT BY REASON THEREOF ENTITLED TO ALLOTMENTS ON THE RESERVATION UNDER THE ACT OF JUNE 7, 1897

Case No. 152, *Virginia Walkowsky, et al.* v. *United States,* involves three petitioners who are the youngest children of Kate Walkowsky Weiss. (R. 169, 648–649, 682.) Kate Walkowsky Weiss

was a full-blood Indian, her father being a Chinook Indian and her mother a Wynooche Indian of the Chehalis Tribe. (R. 358–360.) In 1893 she married John Walkowsky, a white man, by whom she had eleven children. The mother and her first eight children were adopted by the Quinaielt Tribe and were granted allotments on the reservation. Subsequent to this adoption the other three children, who are petitioners here, were born. Thereafter these three petitioners were refused adoption by the Quinaielt Tribe. (R. 359–361, 524–525.) They contend that they are entitled to allotments under the Act of June 7, 1897 (pp. VIII–IX, *infra*), which provides:

> That all children born of a marriage heretofore solemnized between a white man and an Indian woman *by blood and not by adoption*, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, *by blood*, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right. (Italics ours.)

If Kate Walkowsky Weiss was not entitled to allotment on the Quinaielt Reservation *by blood*, but only by reason of the fact that she was *adopted* by that tribe, then the decision of the Circuit Court

of Appeals that her children (the petitioners in Case No. 152) were not entitled to allotments upon the reservation by reason of the above statute, seems to be clearly correct. The 1897 Act expressly refers to the property "of the tribe to which the mother belongs * * * * *by blood.*"

But the petitioners contend that the adoption of Kate Walkowsky Weiss was an unnecessary act and that she was entitled to an allotment upon the Quinaielt Reservation *by blood*, wholly apart from her adoption by the tribe. They rely upon the fact that her mother was a part Lower Chehalis Indian and point to the stipulation of the parties that members of the Lower Chehalis tribe are entitled to allotments on the Quinaielt Reservation. (R. 421, 652.) But although Kate Walkowsky Weiss' mother was a Lower Chehalis Indian, her father was a Chinook Indian and her tribal rights would, therefore, be in the Chinook Tribe rather than in that of her mother.[1] *Pape* v. *United States*, 19 F. (2d) 219, 221 (C. C. A. 9th); *Smith* v. *Bonifer*, 154 Fed. 883, 889, affirmed, 166 Fed. 846 (C. C. A. 9th); *Farrell* v. *United States*, 110 Fed. 942, 944 (C. C. A. 8th).

Accordingly, it can not be said that the mother was entitled *by blood* to the rights of a member in

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[1] The District Court found that in the Salish Tribes, which include the Chehalis group, lineage is traced through the male ancestry. (R. 374–375.)

the property of the Quinaielt Tribe,[10] and it follows that the petitioners in Case No. 152 are not entitled under the Act of June 7, 1897, to allotments. See *Oakes* v. *United States*, 172 Fed. 305 (C. C. A. 8th).

The petitioners contend that the Circuit Court of Appeals found that Kate Walkowsky Weiss was a half-blood whereas the record shows that she was a full blood Indian. (Pet. Br. 51.) In view of the foregoing, this alleged error would seem to be immaterial.

V

THE ACT OF JUNE 7, 1897, DOES NOT APPLY TO THE GRANDCHILDREN OF A WHITE MAN AND AN INDIAN WOMAN

Case No. 153, *Lizzie Rolfson, et al.* v. *United States* (R. 150, 361–364, 650–653, 683), involves two petitioners who are the children of a white man and one Lizzie Rolfson (R. 151, 158, 362). Lizzie Rolfson was the daughter of a white man and a Chehalis (Upper or Lower) Indian woman.[11] (R. 362, 651.) In 1918 Lizzie Rolfson, her four children and two grandchildren, applied to the Quinaielt Indians for enrollment and adoption. This application was refused, and the refusal was approved by the Secretary of the Interior. (R. 651.) The

[10] Unless, of course, as held by the District Court, Chinook Indians are entitled to allotments upon the Quinaielt Reservation without the necessity of adoption by the Quinaielt Indians, and even though not residing upon the Reservation.

[11] The mother of Lizzie Rolfson was found by the District Court to have been tribally recognized as a member of the Chehalis Tribe. The Circuit Court of Appeals treated the question as if the mother was a Lower Chehalis Indian.

District Court granted allotments to Lizzie Rolfson and to Eugene Smith and Alvin Smith, the children of Lizzie Rolfson, by her first marriage to a white man, which occurred prior to June 7, 1897. (R. 363.) Allotments to the other two children and the grandchildren were denied.

The Circuit Court of Appeals, treating the evidence as establishing that Lizzie Rolfson's mother was a Lower Chehalis woman, held that Lizzie Rolfson was entitled to an allotment and to this extent affirmed the decree of the trial court. It denied allotment to the two children of Lizzie Rolfson, petitioners here, on the ground that the Act of June 7, 1897, did not extend to the *grandchildren* of a white man and an Indian woman, even where, as here, the mother was of part Indian blood and the father a white man. (R. 651.) Only the claims of these two children are involved in Case No. 153. (Pet. Br. 108, 158.)

The petitioners in Case No. 153 rely upon the Act of June 7, 1897. But, although Lizzie Rolfson's mother may have been a Lower Chehalis woman, her mother married a white man and her daughter, a half-breed, also married a white man. It seems clear from the discussion in Point IV, *supra*, that Lizzie Rolfson's rights in the tribal property of the Quinaielt Tribe do not arise "by blood," but by the Act of June 7, 1897. That being the case, we see no basis in the statute for applying the Act to *her children*, and we, therefore, submit that

the decision of the court below in this respect is sound. See *Chase* v. *United States*, 172 Fed. 305 (C. C. A. 8th), *supra*, and *Reynolds* v. *United States*, 205 Fed. 685 (D. So. Dak.). See also *William Banks Case*, 26 Land Dec. 71.

The Circuit Court of Appeals, in answer to the contention that the children of Lizzie Rolfson had been "recognized" by the Quinaielt Indians as members of the tribe (although they now live in California, R. 473), held that "recognition of the Indian blood of the children, no matter how made, would not be the equivalent of an adoption." (R. 651.) We know of no authority to the contrary. Where the Indian blood of a person is in doubt, recognition of that person as a member of the tribe might well be accepted as establishing that that person was a member of that tribe by blood, but where, as here, the Indian blood of the petitioners is definitely known, mere "recognition" can not take the place of adoption. See *United States* v. *Work*, 6 F. (2d) 694, 696 (Ct. of App. D. C.).

The petitioners allege that the Circuit Court of Appeals denied allotments to the petitioners because they were "citizens of the United States." We do not think that the decision of the court can be so construed. The reference by the court to the fact that the petitioners were citizens of the United States was for the purpose of pointing out that their status was not that of tribal Indians and, therefore, that they were not entitled, *per se*, to allotments upon the reservation.

VI

OTHER CONTENTIONS OF THE PETITIONERS

Certain of the petitioners have fathers or mothers or various other relatives who have been enrolled and granted allotments upon the Quinaielt Reservation. Apparently it is contended that this fact places the stamp of Quinaielt Indians upon the petitioners so as to qualify them for allotments upon the reservation. But the mere fact that one, or even both, of the parents of an Indian have been enrolled and have been granted allotments upon the reservation does not mean that the Indian is therefore entitled to enrollment and allotment. It is possible for a person having no Indian blood whatever to be adopted by the Quinaielt Indians and he may then be enrolled and granted an allotment upon the reservation. See *United States* v. *Mitchell*, 22 F. (2d) 771 (C. C. A. 9th). But this affords no basis for holding that the children of such a person would have all the rights in the tribal property of the Quinaielt Indians that a member of that tribe *by blood* would have.

We submit that the legal status of these petitioners and that of their parents or other relatives who have been enrolled and granted allotments upon the reservation was fixed by the circumstances of their birth, and was not changed by enrollment of and allotment to the parents or relatives. Whether such enrollment and allotment were lawful or otherwise can not be determined

here. The fact that such enrollment and allotment were made can not serve to create for the petitioners a different legal status than that which they acquired by birth or blood. (R. 452.) See *United States* v. *Hadley*, 99 Fed. 437, 438 (D. Wash.); *United States* v. *Higgins*, 110 Fed. 609, 611 (D. Mont.).

If the Indian blood of a person were in doubt, the fact that a parent or relative was enrolled in and granted an allotment upon the reservation of a certain tribe might be evidence that the blood of that person was of that tribe. Where the blood of the Indian is known, and is such as not to entitle him, *per se*, to an allotment upon the Quinaielt Reservation, the mere fact that his parents are enrolled and granted allotments there does not help him. *Pape* v. *United States*, 19 F. (2d) 219 (C. C. A. 9th).

The District Court found that certain of the petitioners (those in Cases 146, 149, 150, and 151) had been "adopted" into the Quinaielt Tribe at a tribal council of the Quinaielt Indians held in 1912. (R. 340–345.) It is not suggested, however, that this "adoption" was ever approved by the Secretary of the Interior. A tribal adoption to be valid must have such approval. *West* v. *Hitchcock*, 205 U. S. 80; *United States* v. *Mitchell*, 22 F. (2d) 771 (C. C. A. 9th). Accordingly, if these petitioners are not otherwise entitled to allot-

ments upon the Quinaielt Reservation, they are not entitled merely by reason of the alleged "adoption."

Petitioners also argue that the Chehalis, Chinook, and Cowlitz Indians have been deprived of their lands by the United States and, therefore, it would be inequitable to deny them rights on the Quinaielt Reservation. It is doubtful if this is a matter for judicial cognizance. It should be pointed out, however, that only a relatively small amount of their lands, if any, was included in the lands ceded to the United States in the Quinaielt Treaty. It should be further pointed out that by the Act of August 24, 1912, c. 388, 37 Stat. 518, 535, $32,000 was appropriated to be paid *per stirpes* to the Chinook Indians of Washington. Reference to the official payment rolls of the Indian Office shows that some of the petitioners and the parents of other petitioners appear thereon. Moreover, by the Act of February 12, 1925, c. 214, 43 Stat. 886, Congress has authorized Chinook and Chehalis Indians "with whom no treaty has been made" to submit to the Court of Claims claims of whatever nature, both legal and equitable, which these tribes or bands of Indians may have against the United States. Such suits are now pending in the Court of Claims. The Cowlitz Indians also would have been included in this statute but they objected to some of its provisions. (See House Report No. 1029, 70th Cong., 1st Session.)

CONCLUSION

The decrees of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

TREATIES, STATUTES, AND EXECUTIVE ORDER INVOLVED

The Treaty with the Quinaielt and Quillehute Indians of 1855 and 1856 (12 Stat. 971) provides, in part:

> Articles of agreement and convention made and concluded by and between Isaac I. Stevens, governor and superintendent of Indian Affairs, of the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them.
>
> ARTICLE I.—The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the Pacific coast, which is the southwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coast range of mountains; thence southerly with said range of mountains to their intersection with the dividing ridge between the Chehalis and Quiniatl Rivers; thence westerly with said ridge to the Pacific coast; thence northerly along said coast to the place of beginning.
>
> ARTICLE II.—There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts

of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby.

ARTICLE III.—The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves.

* * * * * *

ARTICLE V. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient

quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes, respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor.

* * * * *

Article 6 of the Treaty with the Omahas (10 Stat. 1043, 1044–1045), referred to in Article VI of the

Treaty with the Quinaielt and Quillehute Indians, provides:

> The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one-quarter section; to each family of three and not exceeding five, one-half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one-quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands as-

signed and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

The Executive Order of November 4, 1873 (Kappler, Indian Laws and Treaties, Vol. I, 2d Ed. pp. 923-924), reads as follows:

In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 (Stats. at Large, vol. 12, p. 971), and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory (which tract includes the reserve selected by W. W. Miller, superintendent of Indian affairs for Washington Territory, and surveyed by A. C. Smith, under contract of September 16, 1861) be withdrawn from sale and set apart

for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific coast, viz: Commencing on the Pacific coast at the southwest corner of the present reservation, as established by Mr. Smith in his survey under contract with Superintendent Miller, dated September 16, 1861; thence due east, and with the line of said survey, 5 miles to the southeast corner of said reserve thus established; thence in a direct line to the most southerly end of Quinaielt Lake; thence northerly around the east shore of said lake to the northwest point thereof; thence in a direct line to a point a half mile north of the Queetshee River and 3 miles above its mouth; thence with the course of said river to a point on the Pacific coast, at low-water mark, a half mile above the mouth of said river; thence southerly, at low-water mark, along the Pacific to the place of beginning.

The General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, as amended by the Acts of February 28, 1891, c. 383, 26 Stat. 794, and June 25, 1910, c. 431, 36 Stat. 859 (U. S. C., Title 25, Sec. 331), provides, in part, as follows:

Section 1:

That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such

areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian.

Section 4:

That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children, in quantities, and manner as provided in this act for Indians residing upon reservations. (24 Stat. 389.)

Section 6:

* * * every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

The Act of August 15, 1894, c. 290, Sec. 1, 28 Stat. 305, as amended by the Act of February 6, 1901, c. 217, Sec. 1, 31 Stat. 760 (U. S. C., Title 25, Sec. 345), reads in part as follows:

That all persons who are in whole or in part of Indian blood or descent who are en-

titled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit [district] court of the United States; and said circuit [district] courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, * * * *Provided*, That the right of appeal shall be allowed to either party as in other cases.

The Act of June 7, 1897, c. 3, 30 Stat. 62, 90 (U. S. C., Title 25, Sec. 184), provides:

That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at

the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child or such right.

The Special Allotment Act of March 4, 1911, c. 246, 36 Stat. 1345–1346, provides:

> That the Secretary of the Interior be, and he is hereby, authorized and directed to make allotments on the Quinaielt Reservation, Washington, under the provisions of the allotment laws of the United States, to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third, eighteen hundred and fifty-six, and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes: *Provided*, That the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed.

CONCLUDING PARAGRAPHS AND SIGNERS OF THE ABORTIVE TREATY PROPOSED BY GOVERNOR STEVENS TO THE INDIANS AT THE COUNCIL AT COSMOPOLIS, FEBRUARY 25, 1856.[1]

In testimony whereof, the said Isaac I. Stevens, Governor and Superintendent of Indian Affairs, and the undersigned Chiefs, headmen and delegates of the aforesaid tribes and bands of Indians have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

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[1] Certified copies of this instrument have been filed by respondent in this court and served on counsel for petitioners herein.

Executed in the presence of us, the word "four" being written over an erasure in Article V, and the words "tribes and bands" interlined in Article VIII, before execution.

ISAAC I. STEVENS (Signed),
Gov. & Supt. Ind. Affairs.

TAHOLA (his mark),
Head Chief of Kwinaiult.

HEHT-LITETL (his mark) OR JOHN,
Sub Chief of do.

KEHP (his mark),
Sub Chief of do.

CAPTAIN (his mark),
Sub Chief of Quinaiult.

KLA-WAL-IT-HOW (his mark),
Sub Chief of do (Kwehts band).

HOO-YALT-SEE (his mark),
Sub Chief of do (Kwehts band).

APPENDIX B

STATEMENT OF THE EVENTS LEADING UP TO THE QUINAIELT TREATY OF 1855–1856 AND THE ESTABLISHMENT OF THE QUINAIELT RESERVATION

In 1853 Isaac I. Stevens, Governor of Washington Territory, was instructed by the President to negotiate treaties with the Indians in that Territory. As a result of his activities, numerous Indian treaties were effected in western Washington.[1] (R. 294.) In February, 1855, Governor Stevens called a council at Cosmopolis, on the Chehalis River (see map at p. 10, petitioner's brief), of representatives of the various tribes and bands of Indians in that region. There were present at this council, in considerable numbers, representatives of the Quinaielt, Cowlitz, Chinook, Upper and Lower Chehalis, and Quit Tribes. (R. 385, 386, 390, 426, 440, 442, 583.) It was the purpose of Stevens to have these various tribes cede their territory to the United States, and in exchange therefor to create a large reservation for them somewhere between Cape Flattery and Gray's Harbor, where

[1] See, for instance, the Treaty with the Makah Tribe at Neah Bay of January 31, 1855, 12 Stat. 939; the so-called Point no Point Treaty with the S'Klallams Tribes of January 26, 1855, 12 Stat. 933; the so-called Medicine Creek Treaty with the Nisqually, Puyallup and other Upper Puget Sound Tribes of December 26, 1854, 10 Stat. 1132; and a treaty with the Dwanish and allied Tribes of January 22, 1855, 12 Stat. 927. See Kappler, Indian Affairs, Laws and Treaties, Vol. II, pp. 665, 669, 674, 682.

they could all be placed. (See Swan, The Northwest Coast, pp. 343, 344.)

At the time of the Cosmopolis meeting, the Chinooks, Cowlitz, and Chehalis occupied or claimed, roughly, the land between the Nisqually and Quinaielt Indians on the north, the Cascade Mountains on the east, the Columbia River on the south, and the Pacific Ocean on the west.[2]

The Quinaielts, Quillehutes, Hohs, and Quits occupied or claimed, roughly, the land between the Makah Tribe on the north, the Skallams on the east, along the coast range of mountains to their intersection with the dividing ridge between the Chehalis and Quinaielt Rivers; the Chehalis on the south and the Pacific Ocean on the west.[3]

It appears that Stevens' effort to consummate the proposed treaty resulted in failure, apparently for the reason that the Cowlitz, Chinook, and Chehalis Indians objected to being placed upon a reservation to be located in the Quinaielt country, with the Indians of which they were not upon friendly relations. (See Swan, *ibid*, p. 345; R. 440.) Shortly thereafter a treaty was executed with only the Quinaielt and Quillehute Indians on July 1, 1855, and January 25, 1856, 12 Stat. 971. No separate treaty was made with the Chinook, Cow-

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[2] See map transmitted to the Commissioner of Indian Affairs by Governor Stevens on September 16, 1854, in pocket at the end of this brief, *infra*. See also 18th Annual Report of the Bureau of American Ethnology, Part 2, Indian Land Cessions, pp. 882–883. See also Senate Executive Document No. 1, 33 Cong., 2d Sess., Vol. I, pp. 447, 457.

[3] See map, p. 10, petitioners brief; see Indian Land Cessions, *supra*, pp. 808–809; see Senate Executive Document, *supra*, pp. 448, 457.

litz, and Chehalis Indians, nor with the Quits or Hohs. (R. 294.) The details of the Quinaielt Treaty and events subsequent thereto are stated by the Solicitor for the Interior Department in an opinion, dated October 12, 1916, which was introduced in evidence, as follows (R. 296–300):

> By the above treaty the Indians ceded to the United States a vast tract of country, including nearly 100 miles of the Pacific Coast, extending approximately from a few miles south of Cape Flattery to a few miles north of Gray's Harbor, and back from the coast some 30 or 40 miles to the middle of the coast range of mountains. Article 2 reserved an area sufficient for their wants to be selected by the President and "surveyed or located and set apart for their exclusive use," to which they agreed to remove. Article 3 secured to them the right of taking fish at all usual and accustomed grounds and stations in common with the citizens of the Territory. Article 4 provided that the money paid for their lands should be applied "to the use and benefit of the said Indians under the direction of the President." Article 5 made an appropriation to enable the Indians to remove to and settle upon the reservation to be selected for them and for other purposes. Article 6 provided that the President could at his discretion consolidate these Indians with other tribes and cause the whole or any part of the lands to be reserved under the treaty with such other lands as might be selected in lieu thereof to be surveyed into lots "and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a per-

manent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so fat as the same may be applicable."

In accordance with the provisions of the treaty a reservation was selected by the then Superintendent of Indian Affairs for Washington Territory and surveyed under contract, but as the same was too small to provide for the needs of the Indians, it was never formally set apart by Executive Order. The reservation selected was located on the Pacific Coast from about one-half mile north of the Quinaielt River to a point ten miles south of that river and about six miles back from the coast. In 1872 the Superintendent of Indian Affairs for Washington Territory reported and recommended as follows:

"All the tribes made parties to this treaty, together with the remanants of the Chehalis, Humptulups, Shoalwater Bay, and Chinook tribes, residing along this coast south of the reservation to the mouth of the Columbia River, and the Makah tribe, residing at Cape Flattery, north, are emphatically fish-eaters, and draw their subsistence almost wholly from the water, and therefore have but little taste or desire for agricultural or land productions.

* * * * *

"As the land north and west of this reservation, for many miles, has no attractions for white settlers, and as the Quilliutes, Hohs, and Quits do not reside on the reservation, and refuse to come on to it as at present constituted, and as there is but a small amount of agricultural and pasture lands on the reservation, I recommend that it be enlarged as follows: * * * The

reservation thus enlarged would afford two more fisheries on the Pacific coast, and perhaps several others around Lake Quinaielt, and would afford occasional patches of agricultural and grazing lands, and upon it should be collected not only the three tribes named, but also all the other tribes and bands of fish-eating Indians on the Pacific coast, from the south side of Neah Bay reservation to the mouth of the Columbia River; all of whom could find room and homes on this enlarged reservation."

In view of this report, the Indian Office, on October 31, 1873, recommended the enlargement of the reservation selected by the Superintendent so that the "Hohs, Quits, and other fish-eating Indians residing upon the coast between the Quinaielt river and Makah Indian Reservation may be induced to go upon the reservation," and by Executive Order of November 4, 1873, under authority conferred on the President by Article 6 of the treaty of 1855 and 1856, an enlarged reservation was set apart as follows:

"In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 (Stats. at Large, vol. 12, p. 971), and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory * * * be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific coast, viz: * * *" (See R. 296–300.)

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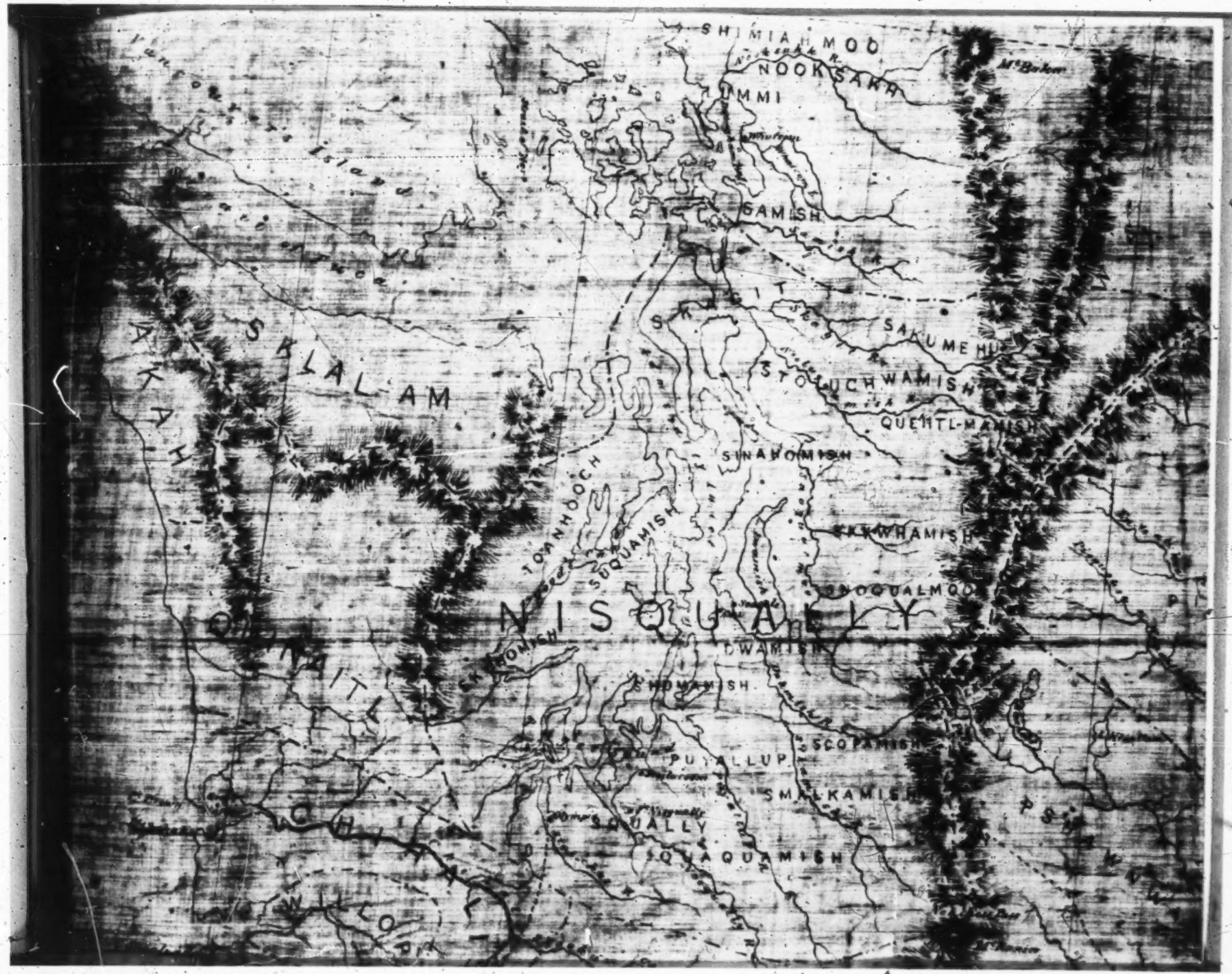
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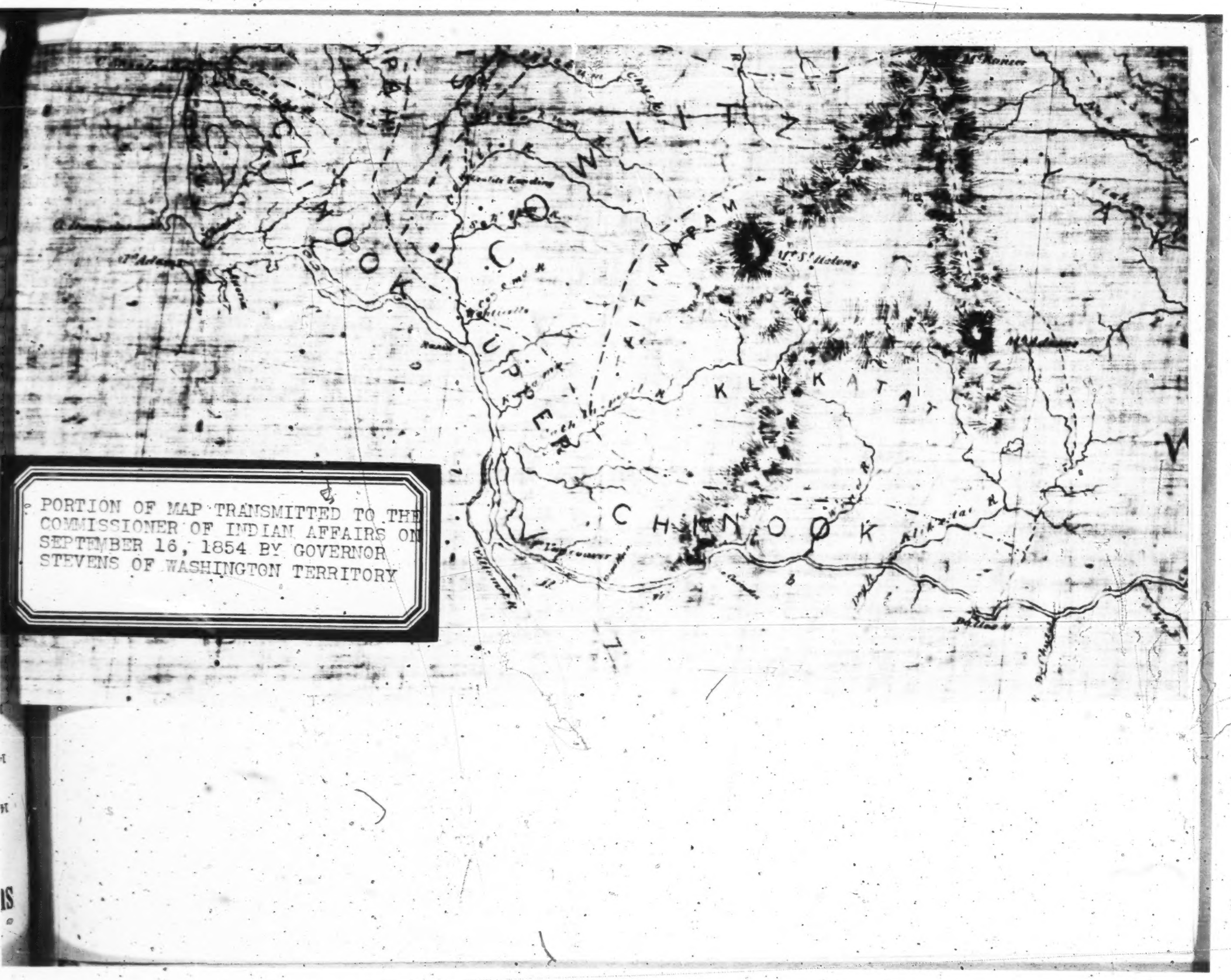
PORTION OF MAP TRANSMITTED TO THE COMMISSIONER OF INDIAN AFFAIRS ON SEPTEMBER 16, 1854 BY GOVERNOR STEVENS OF WASHINGTON TERRITORY
CHINOOK
KLIKATAT
Mt. Rainier
Mt. St. Helens